

Calendar No. 64112TH CONGRESS
1ST SESSION**S. 623**

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2011

Mr. KOHL (for himself, Mr. GRAHAM, Mr. LEAHY, and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

MAY 19, 2011

Reported by Mr. LEAHY, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Sunshine in Litigation
3 Act of 2011”.

4 **SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEAL-**
5 **ING OF CASES AND SETTLEMENTS.**

6 (a) IN GENERAL.—Chapter 111 of title 28, United
7 States Code, is amended by adding at the end the fol-
8 lowing:

9 **“§ 1660. Restrictions on protective orders and sealing**
10 **of cases and settlements**

11 “(a)(1) In any civil action in which the pleadings
12 state facts that are relevant to the protection of public
13 health or safety, a court shall not enter, by stipulation or
14 otherwise, an order otherwise authorized under rule 26(e)
15 of the Federal Rules of Civil Procedure restricting the dis-
16 closure of information obtained through discovery, an
17 order approving a settlement agreement that would re-
18 strict the disclosure of such information, or an order re-
19 stricting access to court records unless in connection with
20 such order the court has first made independent findings
21 of fact that—

22 “(A) such order would not restrict the disclo-
23 sure of information which is relevant to the protec-
24 tion of public health or safety; or

25 “(B)(i) the public interest in the disclosure of
26 past, present, or potential health or safety hazards

1 is outweighed by a specific and substantial interest
2 in maintaining the confidentiality of the information
3 or records in question; and

4 “(ii) the requested order is no broader than
5 necessary to protect the confidentiality interest as-
6 serted.

7 “(2) No order entered as a result of the operation
8 paragraph (1), other than an order approving a settlement
9 agreement, may continue in effect after the entry of final
10 judgment, unless at the time of, or after, such entry the
11 court makes a separate finding of fact that the require-
12 ments of paragraph (1) continue to be met.

13 “(3) The party who is the proponent for the entry
14 of an order, as provided under this section, shall have the
15 burden of proof in obtaining such an order.

16 “(4) This section shall apply even if an order under
17 paragraph (1) is requested—

18 “(A) by motion pursuant to rule 26(e) of the
19 Federal Rules of Civil Procedure; or

20 “(B) by application pursuant to the stipulation
21 of the parties.

22 “(5)(A) The provisions of this section shall not con-
23 stitute grounds for the withholding of information in dis-
24 covery that is otherwise discoverable under rule 26 of the
25 Federal Rules of Civil Procedure.

1 “(B) A court shall not approve any party’s stipulation
2 or request to stipulate to an order that would violate this
3 section.

4 “(b)(1) In any civil action in which the pleadings
5 state facts that are relevant to the protection of public
6 health or safety, a court shall not approve or enforce any
7 provision of an agreement between or among parties, or
8 approve or enforce an order entered as a result of the op-
9 eration of subsection (a)(1), to the extent that such provi-
10 sion or such order prohibits or otherwise restricts a party
11 from disclosing any information relevant to such civil ac-
12 tion to any Federal or State agency with authority to en-
13 force laws regulating an activity relating to such informa-
14 tion.

15 “(2) Any such information disclosed to a Federal or
16 State agency shall be confidential to the extent provided
17 by law.

18 “(c)(1) Subject to paragraph (2), a court shall not
19 enforce any provision of a settlement agreement described
20 under subsection (a)(1) between or among parties that
21 prohibits 1 or more parties from—

22 “(A) disclosing the fact that such settlement
23 was reached or the terms of such settlement, other
24 than the amount of money paid; or

1 “(B) discussing a civil action, or evidence pro-
2 duced in the civil action, that involves matters rel-
3 evant to the protection of public health or safety.

4 “(2) Paragraph (1) applies unless the court has made
5 independent findings of fact that—

6 “(A) the public interest in the disclosure of
7 past, present, or potential public health or safety
8 hazards is outweighed by a specific and substantial
9 interest in maintaining the confidentiality of the in-
10 formation or records in question; and

11 “(B) the requested order is no broader than
12 necessary to protect the confidentiality interest as-
13 serted.

14 “(d) When weighing the interest in maintaining con-
15 fidentiality under this section, there shall be a rebuttable
16 presumption that the interest in protecting personally
17 identifiable information relating to financial, health or
18 other similar information of an individual outweighs the
19 public interest in disclosure.

20 “(e) Nothing in this section shall be construed to per-
21 mit, require, or authorize the disclosure of classified infor-
22 mation (as defined under section 1 of the Classified Infor-
23 mation Procedures Act (18 U.S.C. App.)).”.

24 (b) TECHNICAL AND CONFORMING AMENDMENT.—

25 The table of sections for chapter 111 of title 28, United

1 States Code, is amended by adding after the item relating
 2 to section 1659 the following:

“1660. Restrictions on protective orders and sealing of cases and settlements.”.

3 **SEC. 3. EFFECTIVE DATE.**

4 The amendments made by this Act shall—

5 (1) take effect 30 days after the date of enact-
 6 ment of this Act; and

7 (2) apply only to orders entered in civil actions
 8 or agreements entered into on or after such date.

9 **SECTION 1. SHORT TITLE.**

10 *This Act may be cited as the “Sunshine in Litigation*
 11 *Act of 2011”.*

12 **SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEAL-**
 13 **ING OF CASES AND SETTLEMENTS.**

14 (a) *IN GENERAL.*—Chapter 111 of title 28, United
 15 States Code, is amended by adding at the end the following:

16 **“§ 1660. Restrictions on protective orders and sealing**
 17 **of cases and settlements**

18 *“(a)(1) Except as provided under subsection (e), in*
 19 *any civil action in which the pleadings state facts that are*
 20 *relevant to the protection of public health or safety, a court*
 21 *shall not enter, by stipulation or otherwise, an order other-*
 22 *wise authorized under rule 26(c) of the Federal Rules of*
 23 *Civil Procedure restricting the disclosure of information ob-*
 24 *tained through discovery, an order approving a settlement*
 25 *agreement that would restrict the disclosure of such infor-*

1 *mation, or an order restricting access to court records unless*
2 *in connection with such order the court has first made inde-*
3 *pendent findings of fact that—*

4 “(A) *such order would not restrict the disclosure*
5 *of information which is relevant to the protection of*
6 *public health or safety; or*

7 “(B)(i) *the public interest in the disclosure of*
8 *past, present, or potential health or safety hazards is*
9 *outweighed by a specific and substantial interest in*
10 *maintaining the confidentiality of the information or*
11 *records in question; and*

12 “(ii) *the requested order is no broader than nec-*
13 *essary to protect the confidentiality interest asserted.*

14 “(2) *No order entered as a result of the operation para-*
15 *graph (1), other than an order approving a settlement*
16 *agreement, may continue in effect after the entry of final*
17 *judgment, unless at the time of, or after, such entry the*
18 *court makes a separate finding of fact that the requirements*
19 *of paragraph (1) continue to be met.*

20 “(3) *The party who is the proponent for the entry of*
21 *an order, as provided under this section, shall have the bur-*
22 *den of proof in obtaining such an order.*

23 “(4) *This section shall apply even if an order under*
24 *paragraph (1) is requested—*

1 “(A) by motion pursuant to rule 26(c) of the
2 *Federal Rules of Civil Procedure; or*

3 “(B) by application pursuant to the stipulation
4 *of the parties.*

5 “(5)(A) *The provisions of this section shall not con-*
6 *stitute grounds for the withholding of information in dis-*
7 *covery that is otherwise discoverable under rule 26 of the*
8 *Federal Rules of Civil Procedure.*

9 “(B) *A court shall not approve any party’s stipulation*
10 *or request to stipulate to an order that would violate this*
11 *section.*

12 “(b)(1) *In any civil action in which the pleadings state*
13 *facts that are relevant to the protection of public health or*
14 *safety, a court shall not approve or enforce any provision*
15 *of an agreement between or among parties, or approve or*
16 *enforce an order entered as a result of the operation of sub-*
17 *section (a)(1), to the extent that such provision or such*
18 *order prohibits or otherwise restricts a party from dis-*
19 *closing any information relevant to such civil action to any*
20 *Federal or State agency with authority to enforce laws reg-*
21 *ulating an activity relating to such information.*

22 “(2) *Any such information disclosed to a Federal or*
23 *State agency shall be confidential to the extent provided by*
24 *law.*

1 “(c)(1) Subject to paragraph (2), a court shall not en-
2 force any provision of a settlement agreement described
3 under subsection (a)(1) between or among parties that pro-
4 hibits 1 or more parties from—

5 “(A) disclosing the fact that such settlement was
6 reached or the terms of such settlement, other than the
7 amount of money paid; or

8 “(B) discussing a civil action, or evidence pro-
9 duced in the civil action, that involves matters rel-
10 evant to the protection of public health or safety.

11 “(2) Paragraph (1) applies unless the court has made
12 independent findings of fact that—

13 “(A) the public interest in the disclosure of past,
14 present, or potential public health or safety hazards
15 is outweighed by a specific and substantial interest in
16 maintaining the confidentiality of the information or
17 records in question; and

18 “(B) the requested order is no broader than nec-
19 essary to protect the confidentiality interest asserted.

20 “(d) When weighing the interest in maintaining con-
21 fidentiality under this section, there shall be a rebuttable
22 presumption that the interest in protecting personally iden-
23 tifiable information relating to financial, health or other
24 similar information of an individual outweighs the public
25 interest in disclosure.

1 “(e) *Nothing in this section—*

2 “(1) *shall prohibit a court from entering an*
3 *order that would restrict the disclosure of informa-*
4 *tion, or an order restricting access to court records,*
5 *if in either instance such order is necessary to protect*
6 *from public disclosure—*

7 “(A) *information classified under criteria*
8 *established by an Executive order to be kept se-*
9 *cret in the interest of national defense or foreign*
10 *policy; or*

11 “(B) *intelligence sources and methods; or*

12 “(2) *shall be construed to permit, require, or au-*
13 *thorize the disclosure of information that—*

14 “(A) *is classified under criteria established*
15 *by an Executive order to be kept secret in the in-*
16 *terest of national defense or foreign policy; or*

17 “(B) *reveals intelligence sources and meth-*
18 *ods.”.*

19 (b) *TECHNICAL AND CONFORMING AMENDMENT.—The*
20 *table of sections for chapter 111 of title 28, United States*
21 *Code, is amended by adding after the item relating to sec-*
22 *tion 1659 the following:*

 “1660. *Restrictions on protective orders and sealing of cases and settlements.”.*

23 **SEC. 3. EFFECTIVE DATE AND APPLICATION.**

24 *The amendments made by this Act shall—*

1 (1) take effect 30 days after the date of enact-
2 ment of this Act;

3 (2) apply only to orders entered in civil actions
4 or agreements entered into on or after the effective
5 date of this Act; and

6 (3) not provide a basis for the—

7 (A) granting of a motion to reconsider,
8 modify, amend or vacate a protective order or
9 settlement order entered into before the effective
10 date of this Act; or

11 (B) reversal on appeal of a protective order
12 or settlement order entered into before the effec-
13 tive date of this Act.

Calendar No. 64

112TH CONGRESS
1ST Session

S. 623

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

MAY 19, 2011

Reported with an amendment